

Comment Excerpts Regarding Administrator Pruitt's Role in Rulemaking

Comment Number: EPA-HQ-OEM-2015-0725-DRAFT-0868-15

Organization: Joint Submission from Advocacy Groups, Earth Justice

Commenter: Gordon Sommers

Commenter Type: Advocacy Group

Classification: Substantive

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Comment Excerpt Text:

Administrator Pruitt's Involvement In This Rulemaking Renders It Arbitrary, Capricious, An Abuse Of Discretion, And Unconstitutional.

Decision makers undermine the integrity of the agency rulemaking process and even "violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments." [Italics: *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*], 663 F.3d 476, 487 (D.C. Cir. 2011). In Administrator Pruitt's prior position as Oklahoma Attorney General, he articulated conclusions on some of the very factual and legal issues at issue in this rulemaking and the reconsideration proceeding. He also has ethical obligations to his former client, the State of Oklahoma, which has been at odds with EPA throughout this rulemaking. These factors prevent him from impartially considering the public interest in this matter. At minimum, his prior attacks on the Rule before it was finalized create an appearance that he lacks any semblance of impartiality in this matter; no one can trust that the process or outcome of this new rulemaking will be fair or objective in any way when the Administrator previously advocated for a specific policy position directly contrary to the Rule. See 5 C.F.R. § 2635.101(14) ("Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part."); 57 Fed. Reg. 35,006 (1992) ("Employees have long been required by the standards of conduct to avoid even an appearance of loss of impartiality.").

Administrator Pruitt worked on this rulemaking previously during his tenure as Attorney General of Oklahoma, himself signing comments opposing the Chemical Disaster Rule, which ultimately formed the basis for the reconsideration proceeding that, in turn, ostensibly justifies EPA's proposed rule delay. Comment submitted by Scott Pruitt, Office of Attorney General, State of Oklahoma et al., EPA-HQ-OEM-2015-0725-0624 (July 27, 2016) [Footnote 62: All three petitioners for reconsideration cited to these comments and referenced Administrator Pruitt's participation and position with respect to the rule. Pet. on behalf of the States of La., Ark., Fla., Kans., Tex., Okla., S. C., Wis., W. Va., and Ky. at 1 (Apr. 3, 2017), EPA-HQ-OEM-2015-0725-0762; Pet. of Chemical Safety Advocacy Grp. at 7 (Mar. 13, 2017), EPA-HQ-OEM-2015-0725-0766; Pet. of RMP Coalition at 18 n.55 (Feb. 28, 2017), EPA-HQ-OEM-2015-0725-0764.]. His former client (the State of Oklahoma) filed one of the reconsideration petitions cited by the proposed rule that is part of the reconsideration proceeding EPA has convened. EPA-HQ-OEM-2015-0725-0762. Although filed after Administrator Pruitt took office, the arguments for reconsideration follow up on arguments he included in his prior comments. Administrator Pruitt's advocacy against this rule leaves no doubt as to his intention here to delay and ultimately rescind the Chemical Disaster Rule, without regard for the extensive rulemaking record his agency previously compiled.

Mr. Pruitt's participation in granting the reconsideration petitions and his participation in the current rulemaking are at odds with the commitment he made in his letter of January 3, 2017 to EPA's designated ethics official, in which he indicated that for one year after his resignation as Oklahoma Attorney General, he would not participate personally and substantially in particular matters involving specific parties in which he knows Oklahoma is a party, unless he first seeks authorization from the ethics officer under 5 C.F.R. §2635.502(d). To the extent Mr. Pruitt has not sought and received such authorization, he is precluded from participating in this rulemaking and any further reconsideration proceedings responsive to Oklahoma's petition. No such authorization is currently included in the rulemaking docket.

Furthermore, Administrator Pruitt remains ethically bound to protect the interests of his previous client, Oklahoma. The Oklahoma rules encompass a "principle of loyalty" to former clients. See Ok. R. Professional Conduct § 1.9 comment [4]. The Rules effectuate this principle, in Administrator Pruitt's case, by prohibiting a lawyer now working for the federal government from participating in a matter he previously worked on. Under the Oklahoma Rules of Professional Conduct, "a lawyer currently serving as a public officer or employee ... shall not ... participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing." Id. § 1.11(d). The official comments to those rules interpret this requirement as also applying when a lawyer "has been employed by one government agency and then moves to a second government agency, as when a lawyer is employed by a city and subsequently is employed by a federal agency." Id. comment [5]. While such a lawyer need not be broadly screened from the matter, as in a law firm, the lawyer still "shall not ... participate" unless a waiver is obtained. To the extent Mr. Pruitt has not obtained a waiver from his former client, he is disqualified from participation in this rulemaking. Nor does it appear that he has taken any other measures to ensure an impartial decisionmaking process here. Instead, Administrator Pruitt moved directly from personally signing legal comments opposing the Chemical Disaster Rule to personally signing EPA's proposed delay of that Rule.

Most importantly, Administrator Pruitt's actions demonstrate his single-minded determination to continue acting in step with his former client, rather than following the prior determinations made by his new agency in regard to the Chemical Disaster Rule. Administrator Pruitt's lack of impartiality prevents this proceeding from having any of the trappings of reasoned decisionmaking.

This renders the agency's proposed delay not only arbitrary and capricious, but an abuse of the Administrator's discretion not to recuse himself, and also an unconstitutional violation of the Due Process Clause for all members of the affected public who petitioned for updated chemical safety regulations, filed comments on the request for information or the proposed Chemical Disaster Rule, gave testimony at public hearings, or are relying on the final rule to protect their health and safety. Administrator Pruitt's participation taints the entire process of reconsideration of the Rule, the proposed rule delay, as well as any future action that EPA may take to delay or weaken the Rule. This concern is heightened where the Administrator so blatantly flouts the requirements of the Clean Air Act to achieve his objectives.

Draft Response:

A May 4, 2017 memo from Administrator Pruitt explains his ethics obligations based on consultation with the EPA's Office of General Counsel's Office Ethics Office (OGC/Ethics). The memo explains that OGC/Ethics determined that restrictions in the President's Ethics Pledge regarding former employer and former client, do not apply to Mr. Pruitt because Executive Order 13770 excludes a state government as a former employer. The Office of Government Ethics has determined that this same exclusion applies to the definition of "former client." The May 4, 2017 memo also explains that the federal ethics limitation which would restrict personal and substantial participation in any particular matter involving specific parties (such as the State of Oklahoma) unless he is first authorized by OGC/Ethics to participate pursuant to 5 C.F.R. § 2635.502(d), does not extend to particular matters of general applicability, such as rulemaking. Thus, Administrator Pruitt has properly disclosed and conferred with ethics officials his past actions involving EPA when he was Attorney General of Oklahoma. The outcome of this consultation allows him to participate in decisions involving the RMP rulemaking process without violating of any federal ethics rules.